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In the Supreme Court of the United States

OCTOBER TERM, 1983

A.D.M. CORP.
Petitioner
against
ARTHUR J. THOM SON
and
FROST CONTROLS, INC.
Respondents

UNITED ELECTRONICS COMPANY
Petitioner
against
ARTHUR J. THOM SON
and
FROST CONTROLS, INC.
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

IN RE: A.D.M. CORP., PETITIONER

1. Whether S.E.C. Rule 144, 37 Fed. Reg. 591 (January 14, 1972), 17 CFR 230.144 (A-60 - 107) had the "force and effect of law" binding upon the Courts below as to definition of "underwriter" as applied to Factors' public offer for sale on October 21, 1973 of the unregistered Frost Corp. securities and also as applied to Factors' purported public sale of same to itself on October 26, 1973?

2. Whether Factors was an "underwriter" as defined by Securities Act of 1933 Section 2(11) and S.E.C. Rule 144, 17 CFR 230.144?

3. Whether the Court of Appeals acted in violation of the separation of powers by judicially legislating several independent definitions of "underwriter" through use of its phrase "as well as" in substitution for the statutory word "or", enacted by Securities Act of 1933 Section 2(11), 15 U.S.C. Section 77b(11) and adopted by the S.E.C. by 17 CFR 230.144 (Underscoring supplied.)

4. Whether the S.E.C. through its Rule 144 has expressed a strong public policy against the public offer and/or public sale of unregistered securities by good faith pledgees lacking an exemption or lacking compliance with S.E.C. Rule 144?

5. Whether the Court of Appeals erred in its conclusion that "If there is a public policy against good faith pledgees offering collateral (consisting of unregistered shares) at a foreclosure sale to the public, it is not a strong one"?

6. Whether the Court of Appeals breached its obligations pursuant to FRCP 52 by making unsupported, erroneous inferences of transfer to Factors of legal title to the Frost Corp. securities upon its "de novo" and controlling findings and conclusions that "the contract is not executory; the sale is complete, all parties have relied upon its validity; ..." [A-6] and by erroneously concluding therefrom that in the District Court action plaintiff A.D.M. Corp. sought to set aside an 'executed contract of sale and transfer of title' which would not be permitted?

QUESTIONS PRESENTED

IN RE: UNITED ELECTRONICS COMPANY, PETITIONER

7. Whether the Court of Appeals erred as to its obligations pursuant to FRCP 52 by its failure or refusal to remand to the District Court for findings pursuant to FRCP 52 and thereby condoned the District Court's total, deliberate failure, omission, and refusal to make findings as to essential and substantial facts as to UED's claims against Thomson for breach of fiduciary obligations owed it, arising from Thomson's substantial and deliberate course of conduct wherein he acted hostilely and inimicably to the interests of his principal, UED, in furtherance of his self-motivated pursuit to acquire the Frost Corp.'s assets for himself and in direct competition and derrogation of UED's claims, efforts, and rights to restore the Frost Corp.'s stock and assets to its possession and control?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Angelo M. Torrisi as counsel for A.D.M. Corp. and United Electronics Company, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this Case.

OPINIONS BELOW

The opinion of the District Court [A-25 - 41] has not been officially reported. The opinion of the Court of Appeals [A-1 - 9] is reported at 707 F.2d 25 (1983).

JURISDICTION

The judgment of the Court of Appeals was entered on May 24, 1982 [A-9]. The order denying A.D.M. Corp.'s and United Electronics Company's petition for rehearing was entered on June 17, 1983 [A-24]. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

The pertinent provisions of the Administrative Procedure Act 5 U.S.C. 551 and 553 are set forth in Appendix A-109 - 112; the pertinent provisions of the Securities Act of 1933 Sections 1, 2, 4, 5, and 19, 15 U.S.C. Sections 77a, 77b, 77d, 77e, and 77s are set forth in Appendix A-109 - 121.

RULES INVOLVED

The pertinent provisions of S.E.C. Rule 144, 17 CFR 230.144 as adopted by publication 37 Fed. Reg. 591 (January 14, 1972) are set forth in Appendix A-60 to A-107. The pertinent provisions of FRCP Rule 52 are set forth in Appendix A-108.

STATEMENT

IN RE: A.D.M. CORP., PETITIONER

Prior to October 21, 1974 petitioner had been known as Frost Controls Corp. (Frost Corp.) and on that date defendant Thomson, petitioner's former president and director, caused petitioner's name

to be changed to A.D.M. Corp. concurrent with a transfer of all of Frost Corp.'s assets to Thomson and his alter ego, Frost Controls, Inc. (Frost, Inc.), which he had caused to be formed for this purpose.

Petitioner Frost Corp., plaintiff, brought the principal action against Thomson to recover damages for breach of fiduciary duties owed by him to Frost Corp. and also to recover for its assets transferred to Thomson and his alter ego, Frost, Inc., under claim that the transfer of October 21, 1974 was invalid, was made without authority, Frost Corp. claiming that the title to Frost Corp.'s stock at all times was in its corporate parent, UED, which had neither participated in the transfer by Thomson to himself nor had UED approved or authorized the transfer.

In his defense to the action, Thomson has claimed that as of October 21, 1974 equitable title to the Frost Corp.'s securities was in Factors and Note Buyers Inc. (Factors), which claims to have acquired same by virtue of a bulk bid for all the assets offered on an auction sale on October 26, 1973, which Factors as secured party had caused to be held and at which Factors made the highest and successful bulk bid. Thomson claims that the transfer of Frost Corp.'s assets to himself was made with the authority and approval of Factors' directors.

RE: LEGAL TITLE TO FROST CORP. SECURITIES

From the date of original issue, March 15, 1971, to date, UED was and has been sole record and registered owner of the Frost Corp. securities and held undisputed legal title to same [A-122, III, IV, V].

Legal title to the Frost Corp. securities was transferable only upon the books of the corporation upon surrender of the certificate properly endorsed [A-122 - X] and Factors admitted that it had never surrendered the certificate for transfer, nor did it ever request transfer or make any efforts to transfer title of the Frost Corp. securities to its own name [A-128, CVI, CVII]. Thus, any claims as Factors may have had to the legal title of the Frost Corp. securities had never been reduced to record title and any such claims of title were, at best, solely of an executory nature only.

RE: EQUITABLE TITLE TO THE FROST CORP. SECURITIES

Factors claimed to have acquired equitable title to the Frost Corp. securities by its successful bulk bid at the October 26, 1973 public foreclosure sale which it conducted. In its opinion the District Court found Factors public sale to itself of the unregistered Frost Corp. securities to be exempted from Section 5 registration requirements and thereby concluded that the sale to itself was legal and concluded that Factors thereby acquired equitable title to the Frost Corp. securities.

UED as corporate parent of Frost Corp. was legal and beneficial owner of all of its issued and outstanding securities, which were unregistered. On June 1973 UED pledged its Frost Corp.'s stock concurrent with a pledge of substantial machinery, equipment, inventory to a lender called Factors. When the loan went into default, Factors foreclosed on all of the collateral, offering for forced sale publicly on October 26, 1973 all of the machinery, equipment, inventory, as well as the unregistered Frost Corp. securities and other collateral. Factors presented the successful bulk bid and claims to have acquired title to all the assets offered.

There is no dispute that Factors' foreclosure sale was valid and effective insofar as transfer of title to the tangible assets- machinery, equipment, inventory, etc. may be concerned and it is conceded that Factors acquired full legal title to same; however, Factors' claim of acquisition of title by foreclosure sale to itself of the Frost Corp.'s stock is vigorously disputed.

At trial Frost Corp. argued that the public offer for sale by Factors of the unregistered Frost Corp.'s securities on October 21, 1973 (by advertisement published in the Newark Star Ledger) was in violation of Section 5(c) of the Act was therefore an illegal, and improper means of sale.

At trial, plaintiff Frost Corp. argued that Factors committed an illegal act in violation of Section 5(c) of the Act when it offered for public sale on

October 21, 1973 the unregistered Frost Corp.'s securities; having committed such an illegal act, Factors would not be permitted by the Courts of Equity of New Jersey to acquire equitable title to the Frost Corp.'s securities by taking advantage of its own prior illegal act and by commission of yet another illegal act, namely, the illegal public sale to itself on October 26, 1973 at the forced foreclosure sale which it caused to be conducted.

Thus, at trial, the issue whether there was or was not a transfer of equitable title of the Frost Corp. securities was reduced simply to considerations as to the legality or illegality of the means of offer and/or sale employed by Factors. If the means were legal, then Factors could acquire equitable title and consequently Factors could have and did authorize sale and transfer of Frost Corp.'s assets to Thomson and Frost Inc.; or alternatively, if the means were illegal, then Factors did not acquire equitable title and consequently it could not have authorized the sale and the transfer of assets to Thomson was illegal and improper.

The legality or illegality of the offer for sale turns upon the definition of "underwriter" within the meaning of the Securities Act Section 2(11). If Factors was not an "underwriter", then it was entitled to an exemption pursuant to Section 4(1) and the offer for sale and/or the sale to itself on October 26, 1973 would not have violated the registration requirements of Section 5; the sale to itself would have been legal and

Factors would have acquired equitable title to the Frost Corp. securities. To the contrary, if Factors was an "underwriter" within the meaning of Section 2(11), then the exemption provided by Section 4(1) would not have been available and the offer for sale and the purported sale to itself were in violation of the registration requirements of Section 5, illegal, and therefore Factors did not acquire equitable title to the Frost Corp. securities.

Thus, in the action below Frost Corp., plaintiff/petitioner, did not seek nor did it bring the action below for the purpose of obtaining remedy or relief under the Securities Act of 1933; references to the Securities Act of 1933 and Rule 144 are solely for the purpose of obtaining judicial determination or judicial declaration as to the legality or illegality of Factors acts of offer for sale on October 21, 1973 and Factors purported public sale to itself on October 26, 1973.

---

1. Rule 144 has "force and effect of law" as to definition of "underwriter".

This Court in the course of its opinion in Chrysler Corp. v. Brown, Secretary of Defense, et al, 441 U.S. 281 (1979) had occasion to review the principles applicable to these issues and for convenience we refer to and quote from various portion of this opinion. On the issue of "substantive rule" at page 302 this Court stated:

> "... in Morton v. Ruiz, 415 U.S. 199 (1974), we noted a characteristic inherent in the concept of a 'substantive rule.' We described a substantive rule--or a 'legislative-type rule,' id., at 236--as one 'affecting individual rights and obligations.' Id., at 232. This characteristic is an important touchstone for distinguishing those rules that may be 'binding' or have the 'force of law.' Id., at 235, 236."

And further at page 302, note 31, this Court in referring to the fact it had given some weight in prior cases to the Attorney General's Manual on the Administrative Procedure Act (1947), stated:

> "The Manual refers to substantive rules as rules that 'implement' the statute. 'Such rules have the force and effect of law.' Manual, supra, at 30 n. 3"

Any inquiry as to the scope and purposes of Rule 144 should first note that the Commission has entitled Rule 144 as a "Definition of Terms 'Underwriter' and 'Brokers' Transactions'" [A-60] and significantly the Commission states that:

"Rule 144 is designed to implement the fundamental purposes of the Act as expressed in its preamble:

'To provide full and fair disclosure of the character of the securities sold in interstate commerce and through the

mails, and to prevent fraud in the sale thereof * * * '" [A-65]

Rule 144 was adopted by the Commission pursuant to statutory authority under the Securities Act of 1933 Section 19a, 15 U.S.C. 77s. The Commission's action was undertaken carefully over a period of several years in the course of which and in compliance with the requirements of 5 U.S.C. Section 553(b) the Commission gave public notice of its proposed rule making by publication at 35 Fed. Reg. 15447, Saturday, October 3, 1970, and concurrently invited all interested parties to submit their views and comments on the proposed rule, in writing, for public inspection, Commission's study, and consideration. The Commission carefully considered the comments and as required by 5 U.S.C. Section 553(c) incorporated results of these comments into the publication of adoption of Rule 144, which was effected by publication at 37 Fed. Reg. 591, January 14, 1972 (more than 30 days prior to April 15, 1972, the effective date of Rule 144.) [A-60, A-62, A-107].

The substantive importance of Rule 144 is readily apparent from a reading of same [A-60 - 107]; the Commission scrupulously adhered to its statutory requirements for rule making under 5 U.S.C. Section 553 and there has never been any challenge raised as to the validity of enactment of this very important Rule.

In Securities and Exchange Commission v. Torr, 15 F. Supp. 144, an early case arose to consider the Commission's

power to make rules; the District Court held that Congress having conferred upon the Commission the power to make a particular rule, since such rule did not invade some rights of defendant, then such rule would not be interfered with by the Court; as it is not within the province of the Court to pass on wisdom of the rule as adopted by the Commission.

This Court in Chrysler Corp. v. Brown, supra, when considering the broad questions of grants of legislative authority to a federal agency as sufficient to be binding upon Courts in a manner 'akin to statutes' at page 308 stated:

"What is important is that the reviewing court reasonably be able to conclude that the grant of authority contemplates the regulations issued. Possibly the best illustration remains Mr. Justice Frankfurter's opinion for the Court in National Broadcasting Co. v. United States, 319 U.S. 190 (1943). There the Court rejected the argument that the Communications Act of 1934 did not give the Federal Communications Commission authority to issue regulations governing chain broadcasting beyond the specification of technical, engineering requirements. Before reaching that conclusion, however, the Court probed the language and logic of the Communications Act and its legislative history. Only after this careful parsing of authority did the Court find that the regulations had the force of law and were binding on the courts unless they were arbitrary or not promulgated pursuant to prescribed procedures.

> 'Our duty is at an end when we find that the action of the Commission was based upon findings supported by evidence, and was made pursuant to authority granted by Congress. It is not for us to say that the 'public interest' will be furthered or retarded by the Chain Broadcasting Regulations. The responsibility belongs to the Congress for the grant of valid legislative authority and to the Commission for its exercise.' Id., at 224."

Rule 144 is a "substantive rule" designed to "implement" the Securities Act of 1933 [15 U.S.C. 77a et seq], adopted by the Commission January 14, 1972 in exercise of its statutory authority [15 U.S.C. 77s] and in compliance with Administrative Procedure Act 15 U.S.C. Section 553; Rule 144 had the "force and effect of law" binding upon the Courts below as to definition of "underwriter" applicable to Factors' acts of October 21-26, 1973.; constitutionally, under the separation of powers doctrine, Courts are limited both as to scope of review and/or application of the Rule.

2. Factors was an "underwriter as defined by Securities Act of 1933 Section 2(11) and S.E.C. Rule 144, 17 CFR 230.144.

On October 21, 1973 Factors offered for public sale the unregistered shares of Frost Corp. for UED, issuer.

On October 26, 1973 Factors purportedly sold to itself at a public sale the unregistered shares of Frost Corp. for UED, issuer.

For convenience, the pertinent provisions of Section 2(11) are set forth herein:

> "2(11) The term "underwriter" means any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security ... " (Underscoring supplied.)

In its notice of adoption of Rule 144 the S.E.C. carefully states:

"Moreoever, the Commission hereby emphasizes and draws attention to the fact that the statutory language of Section 2(11) is in the disjunctive. Thus, it is insufficient to conclude that a person is not an underwriter solely because he did not purchase securities from an issuer with a view to their distribution. It must also be established that the person is not offering or selling for an issuer in connection with the distribution of the securities." [A-68]

Again, in the preliminary note to Rule 144 the S.E.C. emphasizes the foregoing by stating [A-91 - 92]:

"It should be noted that the statutory language of Section 2(11) is in the disjunctive. Thus, it is insufficient to conclude that a person is not an underwriter solely because he did not

purchase securities from an issuer with a view to their distribution. It must also be established that the person is not offering or selling for an issuer in connection with the distribution of the securities, does not participate or have a direct or indirect participation in any such undertaking, and does not participate or have a participation in the direct or indirect underwriting of such an undertaking.

Both Section 2(11) and the pertinent provisions of Rule 144 above quoted are clear and unambiguous in application to Factors of the status of "underwriter". As this Court noted in Rubin v. U.S., 449 US 424 at page 430:

> "When we find the terms of a statute unambiguous, judicial inquiry is complete, except "in 'rare and exceptional circumstances'." TVA v. Hill, 437 U.S. 153, 187, n.33 (1978) (quoting Crooks v. Harrelson, 282 U.S. 55, 60 (1930)). Accord, Aaron v. SEC, 446 U.S. 680, 695 (1980); Ernst & Ernst v. Hochfelder, supra at 214, n.33."

The S.E.C. has long used definition of "underwriter" as an essential tool in enforcement of the policies of the Securities Act of 1933 and because of this very special experience and familiarity with the term "underwriter", in its notice of adoption of Rule 144 the S.E.C. took particular care to note that:

> "Not so well understood is the fact that individual investors who are not professionals in the securities

> business may be "underwriters" within the meaning of that term as used in the Act if they act as links in a chain of transactions through which securities move from an issuer to the public." [A-67]

3. Court of Appeals erred by legislating change of definition of "underwriter" for Section 2(11) and Rule 144.

For convenience the pertinent portions of the Court of Appeals' opinion [A-3] are repeated as follows:

> "Section 2(11) of the Act defines "underwriter" broadly to include one who "has purchased from an issuer [or from one who controls an issuer] with a view to ... the distribution of any security" as well as one who "sells for an issuer [or for one who controls an issuer]." Id. at Section 77b(11)." (Underscoring supplied.) [A-3]

The foregoing may be compared with the pertinent provision of the Act:

> " 2(11) The term "underwriter" means any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security ...." (Underscoring supplied.) [A-115]

By comparison of the foregoing two definitive provisions, it appears that the Court of Appeals has judicially legislated a change in the definition of

"underwriter" firstly by substituting the use of its words of definition "to include one who" in place and instead of the words of definition as used by Congress: "means any person who" and secondly by substituting use of its words "as well as" in place and instead of the word used by Congress: "or" to legislate the availability of a choice of subjective and objective independently sufficient definitions for "underwriter" in substitution for the rigidly disjunctive definition of "underwriter" which Congress had legislated at enactment of the Securities Act of 1933, which requires concurrent application of both subjective and objective tests for "underwriter".

The Court of Appeals neither claims to have interpreted the original statute 2(11) nor even Rule 144, each of which define "underwriter" as disjunctive; the Court of Appeals simply took the liberty of changing by substitution the controlling words in both the statute and Rule 144 and concentrated solely upon the subjective standards employed by the District Court.

In its opinion and by way of expanding upon these changes the Court of Appeals stated further:

> "The district court, believing that Factors was not an underwriter and that Section 4(1) of the Securities Act, id. at Section 77d(1), therefore exempted the sale, found for defendants. ... [A-3]
>
> There is considerable support for the district court's view that a

> good faith pledgee who sells unregistered shares at a foreclosure sale is not an "underwriter"" [A-4]

Continuing its loosely developed definition of "underwriter" as applied to Factors and the facts at bar and speaking in support of the District Court's application of only subjective standards to achieve its findings that Factors was not an "underwriter", the Court of Appeals stated further:

> "The district court properly found that Factors did not enter into the pledge arrangement with an eye toward reselling the Frost shares to the public; indeed, the shares ended up in Factors' own hands." [A-6]

And thereby gave support to application of subjective standards only as a fully sufficient test and definition for "underwriter". Both the Court of Appeals and the District Court were satisfied to ignore application of the objective standards also available in 2(11) and Rule 144 and required by definition to be applied disjunctively.

In this approach to the definition of "underwriter" the Court of Appeals has ignored Rule 144's explicit emphasis that the statutory language is in the disjunctive [A-68 - 91] and that both subjective and objective tests are available and must be applied in definition of "underwriter".

A better understanding of the Commission's emphasis upon the disjunctive use of subjective and objective standards is found in the Commission's

explanation as to the background and purpose of Rule 144 as follows:

"Rule 144, together with the other related rules and amendments, is designed to provide full and fair disclosure of the character of securities sold in trading transactions and to create greater certainty and predictability in the application of the registration provisions of the Act by replacing subjective standards with more objective ones." [A-68]

In the course of its opinion the Court of Appeals speculates extensively as to what the Commission might or might not have done in enforcement proceedings; but significantly at no point in its decision does the Court of Appeals refer to or even acknowledge the compendious definitions of "underwriter" developed by the Commision or even the very existence of Rule 144, which is binding upon it "with the force and effect of law".

Perhaps the Court of Appeals questioned the wisdom of the Commission's definition of "underwriter" in Rule 144; perhaps it would have preferred a different definition for "underwriter" than that developed by the Commission in Rule 144. However, it was not the province of the Court of Appeals to judicially legislate a change in either 2(11) or Rule 144; nor was it the province of the Court of Appeals to reject totally <u>by omission</u> this very important rule adopted by the Commission and to refuse to be bound by Rule by avoiding same. Congress granted legislative power to the Commission to enact Rule

144 and unless the rule be shown to be arbitrary or capricious, the Courts are bound by it with the "force and effect of law". See Chrysler Corp. v. Brown, supra; National Broadcasting Co. v. United States, 319 US 190 (1943).

4 and 5. S.E.C.'s Rule 144 supports strong policy against distribution of unregistered securities and creation of public markets by issuers by any means including sales by bona fide pledgees unless exempt or in compliance with Rule 144. The Court of Appeals erred in classification of this policy as "not a strong one".

Any Securities Act inquiry as to public policy should note that protection of the investor is paramount and as this Court has noted in S.E.C. v. Ralston Purina Co., 346 US 119 at page 124:

> "The design of the statute is to protect investors by promoting full disclosure of information thought necessary to informed investment decisions."

Similarly, Rule 144 is designed to implement these fundamental purposes of the Act and towards this end, Rule 144 states:

> "First, the purpose and underlying policy of the Act to protect investors requires, in the Commission's opinion, that there be adequate current information concerning the issuer, ..." [A-69]

And as a corollary to the above, at least twice within Rule 144 [A-65 and A-89], the Commission notes:

"The rule is designed to prohibit the creation of public markets in securities of issuers concerning which adequate current information is not available to the public."

Within Rule 144 pledgees are treated equally with all other potential sellers of unregistered securities; they are accorded no special privileges and are required to comply with Rule 144 or be otherwise statutorily exempt from registration requirements.

The public policy is strong, except that Rule 144 is designed to facilitate an orderly distribution of limited quantities of unregistered securities under conditions assuring availability of adequate public information to the investing public.

If bona fide pledgees were to be accorded a special, privileged status, and be set free of Section 5 registration requirements without specific exemption, then such bona fide pledgees could in fact create the public markets in securities of issuers concerning which adequate information is not available to the public; such special treatment to bona fide pledgees would thwart the very purposes of the Act.

In S.E.C. v. Guild Films Co., 279 F 2d 485 (2d Cir 1960), bona fide pledgee banks made similar argument and the words of the Court at page 490 are of particular note:

> "The banks have contended that they were "bona fide pledgees" and therefore "entitled upon default to sell the stock free of restrictions." They assume that "good faith" in accepting the stock is a sufficient defense. See Loss, Securities Regulation, 346 (1951). But the statute does not impose such a "good faith" criterion. The exemption in Section 4(1) was intended to permit private sales of unregistered securities to investors who are likely to have, or who are likely to obtain, such information as is ordinarily disclosed in registration statements. See S.E.C. v. Ralston Purina Co., 1953, 346 U.S. 119, 73 S.Ct. 981, 97 L.Ed. 1494. The "good faith" of the banks is irrelevant to this purpose. It would be of little solace to purchasers of worthless stock to learn that the sellers had acted in "good faith." Regardless of good faith, the banks engaged in steps necessary to this public sale, and cannot be exempted."

The Court of Appeals erred by its classification of public policy as to public sale by bona fide pledgees in foreclosure as "<u>not a strong one</u>"

6. Contrary to provisions of FRCP 52, Court of Appeals erred by making "de novo" controlling findings and inferences as to the assumed state of contract of sale, transfer of title to Frost Corp. securities, nature of relief sought by Plaintiff, unsupported and contrary to trial record and Trial Court opinion.

In the course of the trial in the District Court the issues as to title to the Frost Corp. securities had been clearly developed and the sole issue before the Court was whether or not Factors had acquired equitable title to the Frost Corp. securities. As the statement set forth at page 4 shows, it was clearly established and without dispute that at all times the legal and record title to the Frost Corp. securities was in UED. While Factors claimed to have purchased at the secured party sale which it conducted on October 26, 1973, Factors did not ever claim that its purchase was executed, but conceded it as executory, but nonetheless claimed it to be sufficient to give it equitable rights to the title.

Factors admitted that it had never requested transfer of title nor did it make any efforts to cause the transaction of purchase to be executed by transfer to itself record title to the securities.

Examination of the opinion in the District Court substantiates the foregoing and nowhere in the opinion is there a hint or reference to anything

but issue as to equitable title to the Frost Corp. securities, which in turn was the very basis of inquiry by the District Court as to the legality or illegality of the offer or means of sale with a consequential and resultant inquiry into the Securities Act issues involving the definitions of "underwriter", etc.

FRCP 52 does not authorize the Court of Appeals to infer material facts nor may the Appellate Court make any controlling inference which the Trial Court has not made and which, if made, would in effect constitute a trial "de novo". Zenith Radio Corp. v. Hazaltine Research Inc., 395 US 100 (1969), Transport Equipment Corp. v. Guaranty State Bank, 518 F 2d 377 (10th Cir. 1975), Hodgson v. Okada Farms Inc., 472 F 2d 965 (CA 10th Cir. 1973)

REASONS FOR GRANTING PETITION.

Prior to Rule 144, subjective standards had been applied in definition of the term "underwriter". Rule 144 was designed to make a clear break with these subjective standards of the past and sought to establish and apply objective criteria. To this extent, the Commission concentrated on the phrase "or offer or sells for an issuer in connection with the distribution of any security" as a means of directing the rule to more objective standards than those previously available. A helpful critique of the rule has been provided by Dan L. Goldwasser, see A Guide to Rule 144, Second Edition, PLI 1978, who interestingly observes at page 20:

> "The validity of the Rule has never been tested in the courts, and in view of its present general acceptance by the securities bar, a judicial challenge now appears unlikely."

The instant decision by the Court of Appeals, while it never mentions Rule 144, represents a substantial departure from the last ten years of satisfactory operation of the rule. The Court of Appeals' insistence that public policy as applied to sales of unregistered securities by bona fide pledgees is "not a strong one" will lend comfort to those who would employ pledgees as a means of distribution of unregistered securities. The insistence by the Court of Appeals that subjective standards are properly applied to sales by pledgees is a throw back to the pre- Guild Films case, supra. The Court of Appeals opinion, if allowed to stand, represents a debilitation of Rule 144 and the Commission's continuing efforts to assure availability of adequate information. The floodgates to distribution of unregistered securities could be opened and the public offer for sale by bona fide pledgees "would afford a ready method of thwarting the policy of the law and evading its provisions." See S.E.C. v. Chinese Benevolent Association, 120 F 2d 738 (2 Cir. 1941).

Petitioner respectfully states that it is preferable to correct the weakening forces of this decision early and not to await experience of substantial harm, which would necessitate corrective action in any case.

Further, the unjustified findings and inferences made "de novo" by the Court of appeals and upon which it based its conclusion 'that plaintiff would loose in any case' represents a substantial throw back to pre- FRCP 52 days and a long since barred trials "de novo" by Courts of Appeals; this breach of FRCP 52 is substantial and should be corrected.

STATEMENT

IN RE: UNITED ELECTRONICS COMPANY
PETITIONER

The Court of Appeals erred by its failure to remand to the District Court for essential and substantial findings pursuant to FRCP 52 which the District Court had totally failed or omitted to make involving an entire course of conduct of Thomson which began immediately following the October 26, 1973 sale, which was motivated by Thomson's selfish, self-serving interest whereby he sought to acquire the Frost Corp.'s assets for himself; Thomson's conduct was hostile and inimical to the interests of his principal, UED, and in direct competition with UED's own efforts to regain Frost Corp. and its assets to its possession and control; Thomson's actions were secretive and concealed from his fellow directors, stockholders, and principals; Thomson engaged in acts of self-dealing in which he took advantage of corporate opportunities and used and diverted corporate assets to his own selfish purposes and use.

UED's claims are unrelated to other claims of Frost Corp. against Thomson for breach of duties; UED's claims against Thomson are unrelated to the issue of title involved in Frost Corp.'s claims against Thomson.

As of November 19, 1973, UED commenced efforts to regain control of the Frost Corp. securities to itself. UED's efforts continued through to June 1975 at which time through successful litigation commenced in New Jersey by UED against Factors, UED recovered the Frost Corp. securities from Factors.

As of October 26, 1973, Thomson began his course of action wherein he sought to acquire Frost Corp.'s assets to himself in competition with the efforts of his principal, UED. Thomson's actions were successful in that in October 21, 1974, he succeeded in obtaining transfer of all of Frost Corp.'s assets to himself without out of pocket disbursement by him.

7. By failure to remand to the District Court for findings pursuant to FRCP 52 the Court of Appeals has erred and condoned the District Court's total failure and omission to make essential and substantial findings as to Thomson's breach of fiduciary duties owed to UED.

By undisputed trial exhibits, UED established a prima facie case of breach of fiduciary duties owed it by Thomson. In support of the established facts UED submitted substantial proposed findings

of fact, each proposed finding was supported by appropriate exhibits, admissions, and other documentary proofs. Many of these proposed findings are included in the Appendix at pages A-122 - 147.

UED established a prima facie case of breach of fiduciary duty; upon such prima facie case the burden to show fairness shifted to Thomson and Thomson offered no evidence in defense [A-141].

Despite the foregoing the District Court failed or omitted to make even a single finding of fact essential to UED's claims.

The Court of Appeals was obliged to remand to the District Court for findings pursuant to FRCP 52, but failed to do so in breach of its obligations under FRCP 52. See State Comm'rs v. Jackson, (1931) 283 US 527; see United Shoe Machinery Corporation v. Kamborian et al, 160 F 2d 461 (1st Cir 1947); 5A Moore's Federal Practice, 52.06[1], [2].

REASONS FOR GRANTING THE PETITION

The District Court's failure and refusal to make findings as to essential facts despite extensive documented requests for such findings warrants supervisory direction by the Court of Appeals to sustain its obligations pursuant to FRCP 52. Rule 52 was adopted to assure proper orderly trials by the Courts with resultant fair treatment to all parties. Orderly conduct of Court proceedings requires proper

adherence to the rules of procedure and rights of parties.

CONCLUSION

The petition of A.D.M. Corp. for a writ of certiorari should be granted.

The petition of United Electronics Company for a writ of certiorari should be granted.

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